Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

October Term, 1996

VANCE J. MORIEL,

Petitioner,

v.

K.W. PRUNTY, WARDEN;
DANIEL E. LUNGREN, ATTORNEY GENERAL
OF THE STATE OF CALIFORNIA,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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23 pp

QUESTION PRESENTED

Whether a criminal defendant's pretrial request to represent himself may be denied based upon a finding that it was a tactic to secure a delay in his trial.

PARTIES

Petitioner, Vance J. Moriel, is a state prisoner in the custody of the California Attorney General. The respondents are K.W. Prunty, Warden; and Daniel E. Lungren, Attorney General of the State of California.

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PETITION FOR WRIT OF CERTIORARI

To the Hon. William H. Rehnquist, Chief Justice of the United States, and to the Hon. Associate Justices of the United States Supreme Court:

Petitioner, Vance J. Moriel, respectfully prays that a writ of certiorari be issued to review the memorandum judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on November 13, 1996.

OPINIONS BELOW

The unpublished memorandum judgment and opinion of the United States Court of Appeals for the Ninth Circuit, filed on November 13, 1996, is reproduced as Appendix A[1] to this petition.

The Ninth Circuit decision was preceded by an unpublished memorandum and order of the United States District Court for the Central District of California, filed on September 6, 1995, which is reproduced as Appendix B to this petition.

The order of the Ninth Circuit Court of Appeals denying the petition for rehearing and suggestion for rehearing *en banc* of petitioner, filed on December 26, 1996, is reproduced as Appendix C to this petition.

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[1] The appendices to this petition are abbreviated "App." and are followed by the hyphenated page reference. The state court clerk's transcript on appeal is abbreviated "CT" and is followed by the page reference.

JURISDICTION

The Ninth Circuit Court of Appeals entered judgment on November 13, 1996. (App. A.) The Court of Appeals thereafter filed its order denying the petition for rehearing on December 26, 1996. (App. C.) The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The Fourteenth Amendment provides in pertinent part:

> "No State . . . shall . . . deprive any person of life, liberty, or property, without due process of law . . . "

Title 28, United States Code, § 2254 provides in pertinent part:

> "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in

behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

STATEMENT OF THE CASE

Petitioner Vance J. Moriel is a California prisoner serving a term of imprisonment based upon his state conspiracy conviction. (App. B-1.) The information charging petitioner and three others with conspiracy to commit murder and murder was filed in the Los Angeles County Superior Court on June 25, 1987. (CT 122.) On that date an attorney, Lawrence Forbes, was appointed to represent petitioner. (CT 128.)

On August 4, 1987, petitioner made a motion to relieve Forbes and obtain a different appointed lawyer. That motion was denied. (App. B-2.)

On April 8, 1988, petitioner knowingly and unambiguously requested the court to relieve Forbes and permit petitioner to defend himself. That request was denied. The trial was on trailing status at that time. (App. B-1.)

On June 9, 1988, a codefendant of petitioner, Henry Peters, moved to represent himself. Peters's motion was denied based upon his lack of legal expertise. (CT 218.) That denial was held to be a Sixth Amendment violation and reversed on federal habeas review. *Peters v. Gunn*, 33 F.3d 1190 (9th Cir. 1994). The question of timeliness was not addressed in the *Peters* decision.

Petitioner's trial was continued multiple times and did not commence until July 14, 1988. (CT 229.) Petitioner and his codefendants were convicted of conspiracy to commit murder on September 19, 1988. (CT 408-410.) Petitioner was sentenced on November 18, 1988, to a term of 25 years to life. (CT 432.)

The California Court of Appeal, Second Appellate District, affirmed the convictions of all four defendants on direct appeal in an unpublished opinion filed on January 17, 1992. (No. B038567.) Petitioner argued on state appeal that the trial court had erred in denying his April 8, 1988, motion to represent himself. Peters also argued on state appeal that the trial court had erred in denying his June 9, 1988, motion to represent himself.

After exhausting his state remedies, petitioner filed a petition for writ of habeas corpus in the United States District Court for the Central District of California on August 31, 1994. (App. B-1.) Ground Four of the petition alleged a denial of petitioner's right to represent himself. An evidentiary hearing was held on June 20, 1995. (App. B-3.) The district court filed its memorandum and order denying habeas relief on September 6, 1995. The district court concluded that petitioner was not entitled to any habeas relief because his pretrial motion for self-representation "was made for the purpose of delay." (App. B-6.) The district court based its ruling upon Ninth Circuit authority, including *Fritz v. Spalding*, 682 F.2d 782, 784 (9th Cir. 1982), holding that a request for self-representation is timely if made before jury impanelment, *unless it was a tactic to secure delay*. (App. B-3 and B-4.)

Petitioner appealed to the Ninth Circuit. On November 13, 1996, the Ninth Circuit affirmed in an unpublished memorandum decision. (App. A-1.) The memorandum decision cited circuit authority, including *United States v. Smith*, 780 F.2d 810, 812 (9th Cir. 1986), holding that a pretrial motion to proceed *pro se* may be denied if it is a delaying tactic. The Ninth Circuit concluded that the district court's finding – that petitioner's pretrial motion to defend himself was a delaying tactic – was not clearly erroneous. (App. A-3.)

Petitioner thereafter filed a petition for rehearing and suggestion for rehearing *en banc*, which was denied by the Ninth Circuit on December 26, 1996. (App. C.)

REASONS FOR GRANTING THE PETITION

1. *Conflict of circuit authority.* There is a split of circuit authority on whether a criminal defendant has an unqualified right to represent himself if his motion to do so is made before trial.

In the Second, Fourth and District of Columbia Circuits, a defendant's right to represent himself is unqualified if asserted before the commencement of trial. *United States ex rel. Maldonado v. Denno*, 348 F.2d 12, 15-16 (2d Cir. 1965), *cert. denied*, 384 U.S. 1007 (1966) (right of self-representation "unqualified if invoked prior to the start of the trial" but "sharply curtailed" thereafter); *accord, United States v. Cauley*, 697 F.2d 486, 491 (2d Cir.), *cert. denied*, 459 U.S. 1222 (1983); *United States v. Lawrence*, 605 F.2d 1321, 1325 (4th Cir. 1979), *cert. denied*, 444 U.S. 1084 (1980) (dictum that *pro se* right not subject to trial court

discretion if exercised before meaningful trial proceedings have commenced); *United States v. Dougherty,* 473 F.2d 1113, 1123-1124 (D.C. Cir. 1972) (pretrial right to proceed *pro se* not subject to discretion, but can be lost through disruptive behavior during trial).

In the Fifth, Sixth and Ninth Circuits, on the other hand, a criminal defendant's pretrial motion to represent himself may be denied if the court finds it was a delay tactic. *Chapman v. United States,* 553 F.2d 886, 887 (5th Cir. 1977) ("We hold that a demand for self-representation must be honored as timely if made before the jury is selected, absent an affirmative showing that it was a tactic to secure delay."); *Robards v. Rees,* 789 F.2d 379, 383 (6th Cir. 1986) (recognizing the same "delay tactic" proviso); and *Fritz v. Spalding, supra,* 682 F.2d at 784.

This sharp split of circuit authority between the Second, Fourth and District of Columbia Circuits, on the one hand, and the Fifth, Sixth and Ninth Circuits, on the other hand, shows why this petition should be granted to clarify an important question of constitutional criminal procedure.

2. *Significant and unsettled federal question.* In addition, this important constitutional question was expressly left open in *Faretta v. California,* 422 U.S. 896 (1974). In *Faretta,* the question of qualifications upon a pretrial right to proceed *pro se* was not presented because " . . . weeks before trial, Faretta clearly and unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel." 422 U.S. at 835. Justice Blackmun, dissenting, observed that the majority opinion left open multiple "procedural problems" including the following:

"How soon in the criminal proceeding must a defendant decide between proceeding by counsel or *pro se*?" 422 U.S. at 852.

Justice Blackmun's question is now squarely presented in this petition. It is undisputed that petitioner's request to proceed *pro se* was knowing, unambiguous, and asserted well before the commencement of his trial. In fact, petitioner's trial did not commence until months after his request to represent himself had been denied by the California Superior Court.

The approach adopted by the Second, Fourth and District of Columbia Circuits is sound, and is required by the Sixth Amendment.[2] A criminal defendant's right to represent himself is properly curtailed and qualified if asserted after the start of trial. Disruption and manipulation would be invited without such a qualification. But those concerns do not apply, or else are easily managed, if the defendant's request to proceed *pro se* is asserted before the start of trial. This is an area of the law, like the attachment of jeopardy, where a bright-line rule is necessary to secure an important constitutional right and to guide the lower courts.

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[2] The "delay tactic" limitation on a pretrial motion to proceed *pro se* can be traced to dictum contained in *United States v. Price*, 474 F.2d 1223, 1227 (9th Cir. 1973) ("The record contains no hint that the motion was a tactic to secure delay, and there is nothing that suggests that any delay would have attended the granting of the motion.") That dictum was picked up by other circuits and incorporated as a substantive limitation on the pretrial right of self-representation. *Robards v. Rees*, *supra*, 789 F.2d at 383; *Chapman v. United States*, *supra*, 553 F.2d at 894.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VANCE J. MORIEL, Petitioner-Appellant, v. K. W. PRUNTY, Warden; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Respondents-Appellees.	No. 95-56573 D.C. No. CV-94-05942-GHK MEMORANDUM* (Filed Nov. 13, 1996)

Appeal from the United States District Court
for the Central District of California
George H. King, District Judge, Presiding

Submitted November 8, 1996**
Pasadena, California

Before: BROWNING, THOMPSON and THOMAS, Circuit Judges.

Vance J. Moriel appeals from the district court's denial of his habeas corpus petition. We have jurisdiction under 28 U.S.C. § 2253, and we affirm.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for disposition without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34 4.

The district court found that Moriel brought his motion to proceed pro se as a delaying tactic. We review this finding for clear error. *United States v. Smith*, 780 F.2d 810, 812 (9th Cir. 1986).

The basis for Moriel's desire to proceed pro se was his counsel's alleged lack of interest in and commitment to his defense. Moriel had ample opportunity to raise his motion earlier. He had expressed dissatisfaction with his counsel as early as August 1987, but did not raise his pro se motion until April 1988. He made several court appearances between August and April, during which he could have raise his pro se motion. Instead, Moriel delayed bringing the motion for eight months, while the case was trailing for trial.

Further, in response to the state trial court's question about whether he could be prepared for trial in twenty days, Moriel stated only "No, I need more time." He did not inform the state trial court that, as he now alleges, he needed only twenty-one days to prepare.

Our conclusion in *Peters v. Gunn*, 33 F.3d 1190 (9th Cir. 1994), has no effect on this appeal. In *Peters*, we concluded a court may not deny a motion to proceed pro se based on a defendant's lack of legal expertise. We did not address whether the motion was timely.

The district court's finding that Moriel did not make the motion in good faith, but only for the purposes of delay is not clearly erroneous.[1]

AFFIRMED

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[1] Because we affirm the district court's denial of Moriel's habeas petition on the ground stated, we need not consider the applicability, if any, of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996), to this appeal.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

VANCE JAMES MORIEL, Petitioner, vs. K. W. PRUNTY, et al., Respondents.	NO. CV 94-5942-GHK MEMORANDUM AND ORDER (Filed Sep. 6, 1995)

Procedural Background

On August 31, 1994, petitioner, a state prisoner, filed this federal habeas petition challenging his state murder conviction on various grounds. We appointed counsel to represent petitioner, and held an evidentiary hearing. The only issue before the court is whether petitioner is entitled to habeas relief because he was denied his right to proceed in *pro per.*[1]

Background Facts

Petitioner made his *Faretta* motion on April 8, 1988. The trial judge denied it as untimely. At that time, the case was on trailing status for trial.

At the evidentiary hearing, petitioner testified as follows:

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[1] At the evidentiary hearing, counsel for petitioner acknowledged that petitioner has withdrawn all claims other than his claim under *Faretta v. California*, 422 U.S. 806 (1975).

Lawrence Forbes was appointed to represent him on June 25, 1987. Petitioner quickly did not care for Mr. Forbes. On August 4, 1987, petitioner made a motion for new counsel, which the judge denied.

Petitioner had not decided to proceed in *pro per* at the time his request for new counsel was denied. He made that decision "a little bit after August . . . 4th." Despite this decision, petitioner gave Mr. Forbes some six months to see if counsel would do something for him. But, Mr. Forbes did nothing during that period. When asked why he waited six months, petitioner's answer was that "I just felt that I was trying to um see would he help."

Petitioner requested to proceed in *pro per* on April 8, 1988, some eight months after his request for new counsel was denied. He told Mr. Forbes he wanted to proceed in *pro per* sometime in January or February, 1988. No request was made until April because petitioner had asked counsel to make such motion with the court. The implication is that Mr. Forbes did not bring up petitioner's *Faretta* request until April 8, 1988.

Petitioner testified to having some three disagreements with Mr. Forbes. First, petitioner disagreed with counsel's advice to admit to the possession of a gun. This dispute arose even before August, 1987. At that time, petitioner already "knew that he (Forbes) weren't (sic) out to help me."

The next dispute concerned whether petitioner should take the stand. This first occurred shortly after Mr. Forbes was appointed to represent petitioner. Petitioner admitted that he knew he did not want Mr. Forbes as his

attorney when Forbes told petitioner that he should not testify due to some statement he had given to the police.

The third dispute occurred between February and April, 1988. This concerned whether James Williams ought to be called as a witness at trial.

Despite these long-standing disputes and his long-held view that he did not want Mr. Forbes as his attorney because Forbes would not help him, petitioner made no request to proceed in *pro per* until April 8, 1988. At that time, he told the judge that he needed more time to prepare for trial. When the judge asked petitioner whether 10 to 20 days were sufficient, petitioner said "no."

At the evidentiary hearing, petitioner testified that he would have needed no more that [sic] three weeks to prepare for trial. But, he did not communicate this to the state trial judge at the time of his *Faretta* request.

Petitioner's friend since childhood, and co-defendant in the underlying criminal case, testified that he overheard disputes between petitioner and his counsel. He heard petitioner say repeatedly that he did not want Forbes as his attorney, that he wanted to go *pro per,* but that Forbes said petitioner could not go *pro per* because he was not able to represent himself.

Discussion

The only issue is whether petitioner's assertion of his right to proceed in *pro per* is timely. Such request is timely if it was made before jury empanelment, unless it was a

tactic to secure delay. *Fritz v. Spalding,* 682 F.2d 782, 784 (9th Cir. (1982).

There is no dispute that petitioner's request was made before jury empanelment. Therefore, it was timely, unless it was a tactic to secure delay. *Id.*

Delay *per se* is not a sufficient reason to deny petitioner's request. To determine whether petitioner's purpose was to delay, we must consider (1) the effect of the delay, (2) the events preceding the motion, and (3) whether petitioner could reasonably be expected to have made the motion at an earlier time. *Id.* at 784-85.

A. Effect of the Delay

Although delay *per se* is insufficient to deny a *Faretta* request, the effect of the delay is a factor which we consider in determining whether petitioner's request was made for purposes of delay. A showing that a continuance is required as a result of the *Faretta* request, particularly if the prosecution is prejudiced or where a defendant's pre-trial conduct has already caused substantial delay, is some evidence of dilatory intent. *See Id.*

Here, the trial was in trailing status at the time petitioner's request was brought to the court's attention. The judge asked petitioner if he would be prepared to proceed in 10 to 20 days. Petitioner said "[n]o, I need time" without further elaboration.

At the evidentiary hearing, petitioner claimed that he wanted a three-week continuance, at most. Having observed petitioner's demeanor and manner and considered the record as a whole, we find this testimony not

credible. If petitioner had wanted only 21 days to prepare, he would most certainly have brought that to the court's attention when the judge suggested a continuance of up to 20 days. The judge would most likely have granted the extra one-day continuance, and petitioner must have known that. But, he made no effort to ask the judge for the extra day.

The reasonable inference we draw from these facts is that petitioner did not want to proceed to trial in 20 or 21 days. In rejecting the 10 to 20 day continuance suggested by the judge without any counter-proposals, petitioner betrayed his intent to delay the proceedings, not to secure enough time to prepare his defense.

B. Events Preceding the Motion

The events preceding the motion on April 8, 1988 are highly suggestive of petitioner's intent to delay. Petitioner testified that he had serious problems with Mr. Forbes shortly after Forbes' appointment. Even before August, 1987, petitioner knew that Forbes "weren't (sic) out to help me," and that he needed a different lawyer.

But, when petitioner's motion for new counsel was denied in August, 1987, petitioner did not then seek to proceed in *pro per*. Rather, he supposedly decided to give Forbes another six months to redeem himself. Yet, petitioner testified that Forbes never did anything to help him or to prepare the case during the six-months period.

The fact that petitioner permitted another six months to elapse under these circumstances is strong evidence

that he was interested in delay, not in advancing the case toward trial.

C. Timing of the Motion

Petitioner could have reasonably made the request far earlier than April, 1988. Because he knew even before August, 1987 that Forbes would not do anything for him, and because he may have decided to proceed in *pro per* as early as shortly after August, 1987, there was no reason for his failure to make such request for another seven or eight months.

During the interim between August, 1987 and April, 1988, petitioner made several appearances before the court. Despite such ample opportunities, he failed to mention any desire to go *pro per* at any of those prior appearances.

Conclusion

Having considered all the relevant factors, we conclude that petitioner's April 8, 1988 request to proceed in *pro per* was made for the purpose of delay. Accordingly, he is not entitled to any federal habeas relief. This petition is denied, and the action is dismissed on the merits.

IT IS SO ORDERED.

Dated: This 5th day of September, 1995

/s/ George H. King
GEORGE H. KING
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VANCE J. MORIEL, Petitioner-Appellant, v. K. W. PRUNTY, Warden; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Respondents-Appellees.	No. 95-56573 D.C. No. CV-94-05942-GHK ORDER (Filed Dec. 26, 1996)

Before: BROWNING, THOMPSON and THOMAS, Circuit Judges.

The panel, as constituted above, has unanimously voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The suggestion for en banc rehearing has been circulated to the full court, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.